Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a *qui tam* suit against a State or state agency is barred by the Eleventh Amendment.

PARTIES TO THE PROCEEDINGS

The United States of America, represented by the Attorney General of the United States, was an intervenor in the court of appeals and is the petitioner in this Court. The State of Texas, the Texas Department of Human Services, the Texas Department of Health, and the Texas Health & Human Services Commission were appellants in the court of appeals. The United States of America ex rel. James M. Churchill was the appellee in the court of appeals.

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is not yet reported. The opinion of the district court (App., *infra*, 3a-41a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. Section 3729 of Title 31, United States Code, provides in pertinent part:

> **False claims**
>
> (a) LIABILITY FOR CERTAIN ACTS.—Any person who–
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> * * * * *
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person * * *.

3. Section 3730 of Title 31, United States Code, provides in pertinent part:

* * * * *

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

* * * * *

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits any "person" from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The FCA also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). A "person" who violates the FCA "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

Suits to collect the statutory penalties may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1). When a *qui tam* action is brought, the government is given an opportunity to intervene to take over the suit. 31 U.S.C.

3730(b)(2) and (c)(3). If the government declines to intervene, the relator conducts the litigation. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of civil penalties, those penalties are divided between the government and the relator. 31 U.S.C. 3730(d).

2. The instant case involves a *qui tam* action filed by James M. Churchill alleging the submission of false claims in connection with the Medicaid program. The defendants included the State of Texas, the Texas Department of Human Services, the Texas Department of Health, and the Texas Health & Human Services Commission. App., *infra*, 4a-5a. Those state entities are respondents in this Court. The state defendants moved to dismiss the *qui tam* claims, arguing that (1) the suit was barred by the Eleventh Amendment, and (2) a State or state agency is not a "person" subject to liability under the FCA, 31 U.S.C. 3729. See App., *infra*, 29a, 36a.[1]

The district court denied the state defendants' motion to dismiss the *qui tam* claims against them. App., *infra*, 3a-41a. The court held that the Eleventh Amendment did not bar the suit, *id.* at 30a-36a, and that the state defendants are "person[s]" within the meaning of the FCA, *id.* at 36a-39a.

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[1] The National Heritage Insurance Company (National Heritage) was also named as a defendant in the district court. National Heritage moved to dismiss the claims against it on the grounds that (1) the FCA's *qui tam* provisions are unconstitutional in their entirety, (2) the relator had failed to allege fraud with sufficient particularity, and (3) the allegations of the complaint failed to state a claim for relief under the FCA. The district court rejected those contentions. See App., *infra*, 6a-24a, 24a-27a, 28a-29a. National Heritage did not appeal from the district court's denial of its motion to dismiss, and those issues are accordingly not before this Court.

3. The state defendants filed an interlocutory appeal. The United States government, represented by the Attorney General, intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the FCA's *qui tam* provisions. App., *infra*, 42a. The court of appeals reversed. *Id.* at 1a-2a. The court explained (*id.* at 2a) that the case was controlled by its recent decision in *United States ex rel. Foulds* v. *Texas Tech University*, 171 F.3d 279 (5th Cir. 1999), petitions for cert. pending, Nos. 99-321, 99-365 & 99-513. In *Foulds*, the Fifth Circuit held that unless the United States elects to take over the conduct of a particular *qui tam* action, a *qui tam* suit against a state defendant is barred by the Eleventh Amendment. See *Foulds*, 171 F.3d at 294; App., *infra*, 2a.

ARGUMENT

On June 24, 1999, this Court granted the petition for a writ of certiorari in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828. The second question presented in that case is "[w]hether the Eleventh Amendment precludes a private relator from commencing and prosecuting a False Claims Act suit against an unconsenting State." 98-1828 Pet. at i.[2] The petition explains that the Second Circuit's resolution of that constitutional question in *Vermont Agency of Natural Resources* conflicts directly with the Fifth Circuit's decision in *Foulds*. See 98-1828 Pet. at 12-15.

As our brief on the merits in *Vermont Agency of Natural Resources* explains (98-1828 U.S. Br. at 33-49),

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[2] *Vermont Agency of Natural Resources* also presents the question "[w]hether a State is a 'person' subject to liability under 31 U.S.C. § 3729(a) of the False Claims Act." 98-1828 Pet. at i.

the position of the United States is that a *qui tam* suit against a State or state agency is not barred by the Eleventh Amendment. The Court's decision in *Vermont Agency of Natural Resources* will very likely affect the proper disposition of the instant case. The petition for a writ of certiorari should therefore be held pending this Court's decision in *Vermont Agency of Natural Resources* and then disposed of as appropriate.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828, and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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NOVEMBER 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50605

UNITED STATES OF AMERICA, EX REL.,
JAMES M. CHURCHILL, PLAINTIFF-APPELLEE

vs.

STATE OF TEXAS, ET AL., DEFENDANTS
STATE OF TEXAS; TEXAS DEPARTMENT OF
HUMAN SERVICES; TEXAS DEPARTMENT OF
HEALTH; TEXAS HEALTH & HUMAN SERVICES
COMMISSION, DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

[Filed: Aug. 5, 1999]

Before: JONES and WIENER, Circuit Judges, and LITTLE,* District Judge.

BY THE COURT:**

This appeal involves a *qui tam* action brought under the False Claims Act against the State of Texas and several state entities. This interlocutory appeal arises

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* District Judge of the Western District of Louisiana, sitting by designation.

** Pursuant to 5th CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIRCUIT RULE 47.5.4.

from the district court's denial of the state defendants' motion to dismiss on grounds of sovereign immunity. As all parties agree, the appeal is controlled by this court's recent decision in *United States ex rel. Foulds v. Texas Tech. Univ.*, 171 F.3d 279, 294 (5th Cir. 1999) ("when the United States has not actively intervened in the action, the Eleventh Amendment bars qui tam plaintiffs from instituting suits against the sovereign states in federal court").

Accordingly, the district court's order denying the state defendants' motion to dismiss is REVERSED, and the case is REMANDED for the entry of a judgment dismissing the complaint as to the State of Texas, the Texas Department of Human Services, the Texas Department of Health, and the Texas Health and Human Services Commission.

REVERSED AND REMANDED for Entry of Judgment Dismissing Appellants.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

No. P-97-CA-57

UNITED STATES OF AMERICA, EX REL.,
JAMES CHURCHILL

v.

THE STATE OF TEXAS,
TEXAS DEPARTMENT OF HUMAN SERVICES,
TEXAS HEALTH AND HUMAN SERVICES COMMISSION,
NATIONAL HERITAGE INSURANCE COMPANY, ET AL.

ORDER ON MOTION TO DISMISS

[Filed: June 4, 1998]

BEFORE THE COURT, in the above-captioned cause of action, is Defendant National Heritage Insurance Company's Motion to Dismiss Plaintiff's First Amended Original Complaint, filed April 20, 1998; Relator's Response, filed May 1, 1998; State Defendants' Motion to Dismiss, filed April 20, 1998; (Amended Motion, filed May 7, 1998); Relator's Response, filed May 1, 1998; State Defendant's Reply, filed May 15, 1998, and United States' *Amicus Curiae* Briefs in Opposition to Defendant National, filed May 8, 1998, and in Opposition to Defendant State of Texas, filed May 26, 1998. Each side

briefed the issues quite well, and they were written in the true spirit of advocacy. The Court has divided its analysis into several sections dealing with both Defendant National and State Defendants' Motions to Dismiss. After reviewing the Motions, the Court is of the opinion that the following lengthy decision is appropriate in support of its denial of the Motions to Dismiss.

I. STANDARD OF REVIEW

When reviewing a motion to dismiss for failure to state a claim, the Court may only grant the motion if "it appears beyond any doubt that the plaintiffs would not be entitled to recover under any set of facts that they could prove in support of their claim." *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Defendants in Rule 12(b)(6) motions "admit[] the facts alleged in the complaint, but challenge[] plaintiff's right to relief based upon those fact[s]." *Id.* (quoting *Ward v. Hudnell*, 366 F.2d 247, 249 (5th Cir. 1966). Therefore this Court accepts as true all factual allegations in the pleadings." *Kansa Reinsurance Co. v. Congressional Mortg. Corp.*, 20 F.3d 1362, 1366 (5th Cir. 1994). The Court need not resolve unclear questions of law in favor of the plaintiff. *Id.* Moreover, a successful affirmative defense may also merit dismissal under Rule 12(b)(6). And finally, in order to avoid dismissal, the plaintiff must plead specific facts—not merely conclusory allegations. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1062 (5th Cir. 1994).

II. PROCEDURAL AND FACTUAL BACKGROUND

In June of 1997, the Relator, James Churchill brought this action on behalf of the United States under the qui tam provisions of the False Claims Act ("the Act"). In

his Complaint, he alleges that Defendants in failing to comply with federal regulations, fraudulently obtained funds to which they were not entitled, in violation of the Act. Pursuant to the provisions of the Act, the Relator's Complaint was placed under seal to allow the United States to conduct an investigation in order to determine whether to assume control of this particular litigation. *See* 31 U.S.C. § 3730. The Court permitted the case to be sealed until March of 1998. On March 13, 1998, the United States declined to intervene and the Relator thereupon promptly served the Complaint on Defendants. Defendants have filed no Answers, but instead have filed Motions to Dismiss which the Court now reviews.

Defendant National Heritage Insurance Company's ("Defendant National's") Motion contends that this case should be dismissed because the Complaint fails to allege a claim upon which relief may be granted and because the Complaint violates the requirements of the Fed. R. Civ. P. 9(b). The main argument of Defendant National's Motion is that the qui tam provisions of the Act, allowing private citizens to sue on the Federal Government's behalf, is unconstitutional. Defendant National also alleges in its Motion that the Relator has failed to plead his allegation of fraud with particularity, as required by Fed. R. Civ. P. 9(b).

State Defendants' Motion contends that this case should be dismissed because the State and its agencies are not "persons" within the meaning of the False Claims Act and because State sovereignty bars this action against the State Defendants.

III. DISCUSSION

A. THE FALSE CLAIMS ACT AND ITS CONSTITUTIONALITY

The Court, in its review of the case law, has learned that the favorite attack on the False Claims Act is an attack on its constitutionality based upon standing and a separation of powers argument.[1] The False Claims Act, 29 U.S.C. § 3730 was originally enacted in 1863 and was amended first in 1943 and then in 1986.[2] Under all

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[1] "The layman's Constitutional view is that what he likes is Constitutional and that which he doesn't like is unconstitutional. That about measures up the Constitutional acumen of the average person." DAVID SHRAGER AND ELIZABETH FROST, THE QUOTABLE LAWYER, 60 (1986) (quoting Hugo L. Black, N.Y. Times, Feb. 26, 1971). The Court is of the opinion, however, that this view is certainly not limited to laymen.

[2] The practice of law is actually a practice of history as the American origins of the False Claims Act demonstrates: At the time the Act was born, the nation was going through a civil war. The War Department also found itself dealing with unscrupulous and corrupt government contractors who were fast becoming "proverbially and notoriously rich" at the government's expense. *United States ex rel. Newsham v. Lockheed Missiles and Space Co., Inc.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989) (quoting 1 F. SHANNON, THE ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY 1861-1865, at 54-56 (1965). "For sugar, [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories." *Id.* At President Lincoln's urging, along with the proof of widespread fraud, Congress enacted the Act and authorized suits to "be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such

versions, the Act has provided for civil actions on behalf of the United States government in order to recover damages and civil penalties for false claims made to the federal government.[3] The qui tam provisions of the Act

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person, and shall be in the name of the United States." *Id.* (quoting Act of March 2, 1863, ch. 67, 12 Stat. 696).

[3] The False Claims Act provides in part:

(a) Liability for certain acts.—Any person who—

1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval;

2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government . . . who lawfully may not sell or pledge the property; or

7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

allow private citizens to act as "whistle blowers" and to enforce the statutory requirements on behalf of the federal government and the individual. *See* 31 U.S.C. §3730(b)(1). The qui tam plaintiff is referred to as the "relator" since he or she "relates" or informs the government of the fraud in question. *See* Kaz Kikkawa, *Medicare Fraud and Abuse and Qui Tam: The Dynamic Duo or the Odd Couple?*, J.L.-Med (Winter 1998). Usually, parties which contract with the federal government are liable if they knowingly provide false claims to the federal government. The lawsuit is actually brought in the name of the United States, and the government is then given the choice between assuming control of the case or allowing the relator to proceed with the lawsuit. *See* 31 U.S.C. § 3730(b)(2).

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is liable to the United States Government.

31 U.S.C. § 3729(a)(1998).

The 1986 amendments essentially increased the penalties assessed against violators, raised the percentage of recovery available to the relator, lowered the burden of proof to a preponderance of the evidence, lowered the standard of knowledge in that the defendant's actual knowledge of falsity or reckless disregard of the truth or falsity is sufficient to create liability; and allowed the relator to continue the suit even if the Government refrains from intervening.

The definition of a "claim" includes:

> any request or demand, whether under contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient of the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee or other recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c).

The government fully retains the right to intervene for good cause shown at any later point in the case. *See id.* At § 3730(c)(4). As required by the Act, the complaint is filed under seal for at least 60 days, and the relator initially serves the United States and not the defendant. A jurisdictional requirement of the relator's suit is that the suit must rest upon information *not* in the possession of the United States prior to the filing of the action. *See* 31 U.S.C. § 3730(e)(4)(A).[4]

1. WHETHER QUI TAM RELATORS HAVE STANDING TO SUE

Defendant National contends that the qui tam provisions of the Act violate the Article III standing requirements of the U.S. Constitution and the principle of separation of powers.[5]

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[4] This is the "original source" requirement and "original source" is defined as:

> an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(c)(2)(B).

31 U.S.C. § 3730 bars other all other suits based on the same facts. "Qui tam suits are meant to encourage insiders privy to a fraud on the Government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot. . . . A 'whistleblower' sounds the alarm; he does not echo it." *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992).

[5] Naturally, if the government had, indeed, elected to intervene in this suit, then standing would not even be an issue. But alas, standing has been made an issue in this case.

Article III limits jurisdiction of the federal courts to those cases which present "cases and controversies." The doctrine of standing is essentially used to determine whether a conflict qualifies as a case and controversy and is therefore capable of judicial resolution. *See Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992). The doctrines of justiciability which limit a federal court's jurisdiction stem from the policy of the separation of powers. *See Allen v. Wright*, 468 U.S. 737, 752 (1984). Specifically, these Article III limits on federal court jurisdiction act as a balance in the three-branch system of government. As the Supreme Court has held, "the law of Art. III standing is built on a single basic idea -the idea of separation of powers." *Id.* at 752. Furthermore, the standing requirement ensures that the courts maintain their correct position in this democratic society by requiring that cases are not only presented in an adversarial context but also are capable of judicial resolution. *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

Standing, one of the most important doctrines of justiciability, is dependent upon three conditions. *See United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 982 F. Supp. 1261 (S.D. Tex. 1997). First, the plaintiff must allege a distinct injury to him or herself, "even if it is an injury shared by a large class of possible litigants." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The purpose of this requirement is to ensure that the federal courts adjudicate real issues. Second, there must be some casual connection between the injury-in-fact and the conduct serving as the basis for the lawsuit. Third, there must be a likelihood that the injury will be redressed by a favorable decision. This standing requirement acts as a routine threshold re-

quirement which is of fundamental importance in litigation. The requirement limits the types of issues which may be brought before the courts. Naturally, this standing, or "case and controversy" requirement is of particular importance in this day and age with its increasing number of challenges to federal statutes and the expenditures of public funds. If the court decides that the party bringing the action is not sufficiently associated with the controversy, then the court is prohibited by Article III from hearing the action.[6]

In this particular case, Defendant National states that the Relator has no injury-in-fact, and therefore has no standing to sue. The Court agrees that some injury-in-fact must be alleged in order to satisfy constitutional requirements. While Congress cannot statutorily waive this constitutional minimum, the Court finds that

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[6] Courts have refused to recognize standing of private citizens seeking review of the executive branch's conduct where the citizens have failed to demonstrate personal injury. *See e.g. Allen v. Wright*, 468 U.S. 737 (1984) (finding that standing could not be predicated upon a claim of stigmatization caused by racial discrimination); *Valley Forge College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982) (finding that the plaintiffs' injury of being deprived of the fair and constitutional use of their tax dollars did not constitute actual injury beyond a generalized grievance - something common to all taxpayers); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974) (finding that plaintiffs as taxpayers have no standing with respect to action challenging armed forces reserve membership of members of Congress); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (finding that conservation organization lacked standing as it only had a mere interest in an environmental problem).

the Act effectively assigns the government's claims to the qui tam relator.[7]

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[7] As one can tell by the following endless list of citations, this statutory grant of standing has been overwhelmingly validated by numerous federal courts, as well as implicitly by the Supreme Court with the unique exception of the recent District Court ruling in *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 982 F. Supp. 1261 (S.D. Tex. 1997). *See e.g., United States ex rel Marcus v. Hess*, 317 U.S. at 541 ("Qui tam suits have been frequently permitted by legislative action, and have not been without defense by the court."); *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (stating historical existence of such suits); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 1125 (1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1992), *cert. denied*, 508 U.S. 973 (1993); *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827 (9th Cir. 1993); *United States ex rel. Woodard v. Country View Day Center, Inc.*, 797 F.2d 888, 893 (10th Cir. 1986) ("The statute of course eliminated any standing problem."); *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1376-77 (D.C. Cir. 1981) ("Congress authorized private citizens to bring civil actions against wrongdoers on the Government's behalf . . ."), *cert. denied*, 455 U.S. 999 (1982); *United States ex rel. Weinberger v. Equifax, Inc.*. 557 F.2d 456, 46 (5th Cir. 1977) (relator has standing in suit even if government elects not to join), *cert. denied*, 434 U.S. 1035 (1978); *Associate Industries of New York State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.) ("Congress can constitutionally enact a statute conferring on any non-official person . . . authority to bring suit. . ."), *cert. denied*, 319 U.S. 739 (1943); *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 836 (N.D. Ill. 1993) (finding qui tam provisions as not violating Article III); *United States ex rel Burch v. Pique Engineering*, 803 F. Supp. 115 (S.D. Ohio 1992); *United States ex rel. U.S.-Namibia Trade & Cultural Council, Inc. v. South West Africa People's Organization*, 585 F. Supp. 632, 633 (S.D.N.Y. 1984) ("the Act confers standing on any person to bring qui tam action. . ."); *Public Interest Bounty Hunters v. Board of Governors*, 548 F. Supp. 157, 161 (N.D. Ga. 1982) (finding that qui tam statutes "provide a private citizen . . . with an interest sufficient to give that individual the standing

Qui tam lawsuits certainly satisfy the Supreme Court's concerns of the adjudication of cases which fail the case and controversy requirement of Article III. Qui tam lawsuits are clearly presented in the traditional adversarial context in that they involve concrete factual disputes which prevent the federal courts from being converted into "judicial versions of college debating forums" issuing nothing but opinions. *Valley Forge College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1982). Qui tam lawsuits are also clearly capable of judicial resolution in that they involve allegations of fraud against the government, and by resolving these allegations, the courts are rendering justice. Congress has quite clearly authorized the qui tam relator to sue in the name of the government, to sue as "representatives of the public interest." *Flast*, 392 U.S. at 120 (Harlan, J., dissenting).[8] Congress may certainly create a legal interest

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to sue. . ."); *Calderwood v. Mansfield*, 71 F. Supp. 480, 481 (N.D. Cal. 1947) ("injury to private interest is not pertinent" in a qui tam action);

The *Riley* Court, on the other hand, clearly held and this Court clearly but respectfully disagrees that Congress cannot constitutionally confer standing on a qui tam plaintiff who has suffered no cognizable claim. The Court also rejected the argument that the relator's injury includes a cash bounty and the possibility for facing costs if the case is found to be frivolous. As the United States *Amicus Curiae* Brief points out, two months after the *Riley* ruling, another court in the same district rejected the *Riley* Court's reasoning and followed the Fifth Circuit's reasoning that the standing issue is a non-issue in that the Act "grants informers standing to sue and an award for successful actions under the statute." *Weinberger*, 557 F.2d at 460.

[8] The issue of standing in the qui tam lawsuit has not been directly addressed by the Supreme Court as of yet. However, the Supreme Court has implicitly addressed the issue in *Marcus*, 317

and then subsequently confer standing in order to assert that interest. *See Traficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-09 (1972). Once Congress creates this statutory standing, the particular limitation that the plaintiff's injury be personal and distinct is not considered by the Court acting as gatekeeper. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). However, Congress cannot, and does not in this Act, waive the constitutional minimum of injury-in-fact.

Assuming in the Relator's favor that Defendants did commit fraud, there is no doubt that the government has been injured. As the name qui tam infers,[9] the relator brings the suit in the name of, standing in the shoes of, the injured government. Essentially, the Act creates a de facto assignment of the government's

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U.S. at 541 and *Marvin*, 199 U.S. at 225 (ratifying a qui tam plaintiff's standing by stating that an informer had a right to sue for recovery even though they had no interest whatsoever in the controversy other than that given by statute.).

[9] The Court rarely demonstrates its expertise in foreign languages by quoting Latin. An exception is going to be made in this case: "Qui tam" is an abbreviation of the Latin phrase "qui tam pro domino rege quam pro si ipso in hac parte sequitur" which means "who sues on behalf of the King as well as for himself." BLACK'S LAW DICTIONARY 125 (6th ed. 1990). Black's Law Dictionary continues in its definition:

> It is an action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution. It is called a "qui tam action" because the Plaintiff states that he sues as well for the state as for himself.

Id.

interest in the suit, and therefore, the relator has standing to sue in place of the government. *See Searcy v. Philips Electronics North America Corp.*, 117 F.3d 154 (5th Cir. 1997) (finding that the government is the real party in interest, even if it elects not to intervene); *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456 (1977) (finding that the Act gives standing to informers). The government, at all times throughout the lawsuit, remains the real party in interest, not the Relator.

In a case where there is evidence of injury-in-fact to the entity on whose behalf and in whose name the lawsuit is brought, it would be superfluous to require a relator to allege an additional injury. However, assuming, for the sake of argument, that Congress had overstepped its constitutional bounds by conferring standing upon a relator or assuming that the relator must allege injury-in-fact, in addition to the government's alleged injury, the Relator in this case still meets the standing requirement. Again assuming the fraud as true, the Relator has arguably suffered injury. The Act's bounty gives the Relator a personal stake in the outcome of the suit.[10] Furthermore, the Relator in

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[10] The Act's bounty is unlike an award of attorneys' fees in that an attorneys' fees award "is wholly unrelated to the subject matter of the litigation, and bears no relation to the statute whose constitutionality is at issue." *Diamond v. Charles*, 476 U.S. 54, 70 (1986). The bounty, on the other hand, is "inextricably intertwined with the underlying lawsuit" which creates "a concrete identifiable interest that falls within the confines of Article III." *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1099 (C.D. Cal. 1989).

The Act states that if the government does participate, then the relator will receive no less than fifteen and no more than twenty-

this case was a staff attorney for Defendant Texas Department of Health, and if the fraudulent conduct is true, he has suffered personal injuries in that he possibly faced termination upon the filing of his complaint, or if he had ignored the presence of fraud in his work environment, he possibly faced prosecution. Therefore, the alleged fraudulent action has created a direct injury-in-fact for the Relator. *See United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1099 (C.D. Cal. 1989) (finding that cash bounty, termination, suspension are injury-in-fact). *See also United States ex rel. Burch v. Piqua Engineering*, 803 F. Supp. 115 (S.D. Ohio 1992) (finding the potential ramifications to the employment status of the relator as injury-un-fact); *cf. United States ex rel Truong v. Northrop Corp.*, 728 F. Supp. 615 (C.D. Cal. 1989) (finding that ramifications to employment status is speculating harm and the basis for standing lies with the injury to the government).

In *Lujan v. Defenders of Wildlife*, the Supreme Court, while denying standing under the Endangered Species Act, 16 U.S.C. § 1531 (1988), distinguished "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff." 112 S.Ct. at 2143. The case at hand is one of those unusual cases.

The Court finds that the Relator has placed a concrete, identifiable claim for fraud against the govern-

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five percent of the bounty. 31 U.S.C. § 3730(d)(1). If the government chooses not to join, the recovery is set at twenty-five to thirty percent. *Id.* § 3730(d)(2)().

ment, and that Congress, pursuant to its policymaking authority has placed the pursuit of relief of such fraud in the hands of the qui tam relator. Thus, this Court finds that the Act confers upon qui tam relators standing to bring suit, thereby satisfying the threshold requirement of a case or controversy under Article III of the Constitution. Alternatively, if the Relator was still required to demonstrate injury-in-fact to himself in order to meet the constitutional threshold, he still satisfies the standing requirement.[11] Accordingly, Defendant National's claim that the Relator does not have standing to bring this suit is without merit, and should be denied.

2. WHETHER THE QUI TAM PROVISIONS VIOLATE THE PRINCIPLE OF SEPARATION OF POWERS

Congress has enacted laws which confer substantive rights on private citizens, and those laws, in turn, authorize private citizens to protect those rights in the judicial system.[12] By referring to these past examples,

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[11] The United States as *Amicus Curiae* also makes a good argument that the qui tam action is analogous to a chose in action. *See United States' Amicus Curiae Br. in Opposition to Def. National's Mot.* at 7-12.

[12] Examples of other federal statutes which authorize individuals to bring claims under the provisions as "private attorneys-general" include: 5 U.S.C. § 552(a)(4) (Freedom of Information Act); 5 U.S.C. § 552a(g)(2)(B) & (g)(3)(B) (Privacy Act); 15 U.S.C. §§ 2618, 2619 (Toxic Substances Control Act); 25 U.S.C. § 201 (recovery of penalties for violation of Indian protection laws); 29 U.S.C. § 1001 (Employee Retirement Income Security Act of 1974); 29 U.S.C. § 216(b) (Equal Pay Act of 1963); 33 U.S.C. §§ 1365, 1369 (Clean Water Act); 35 U.S.C. § 292 (penalties for patent infringement); 42 U.S.C. § 1988 (Civil Rights Attorneys' Fees Award Act of 1976); 42 U.S.C. § 2000e-5(k) (Title VII of the

this Court is not stating that just because Congress has done something in the past, then Congress is right this time. Instead, this Court is stating that the qui tam provisions, just like those past examples, do not encroach upon the Executive Branch's powers, and therefore, there is not a separation of powers problem. Sad as it is to state, in this day and age there is a great deal of fraud occurring which affects every taxpayer's pocketbook. Congress obviously has the power to protect the government from fraud, but it just as obviously does not have the manpower to successfully pursue each claim.[13] The Act, by enlisting private citizens to sue on its behalf, is the government's attempt to recover a fraction of those losses.

a) Purpose of Separation of Powers

The principle of separation of powers is a fundamental part of the United States government. The Supreme Court has consistently "given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380

Civil Rights Act of 1964); 42 U.S.C. § 3613(c) (Fair Housing Act); 42 U.S.C. § 6972 (Resource Conservation and Recovery Act); 42 U.S.C. §§ 7604, 7607 (Clean Air Act); 42 U.S.C. § 9659 (Comprehensive Environmental Response, Compensation, and Liability Act); 42 U.S.C. § 12205 (Americans with Disabilities Act of 1990).

[13] The legislative history shows that Congress intended to encourage private enforcement mainly because "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. Yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities." S. Rep. No. 345, 99th Cong., 2d Sess., at 3 (1986).

(1989). At the same time, though, "the Constitution by no means contemplates total separation" of the three branches of government. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). *See also Morrison v. Olson*, 487 U.S. 654, 694 (1988). The separation of powers doctrine can be violated by provisions of law which either "accrete to a single branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." *Mistretta*, 488 U.S. at 382. The latter type of violation is arguably at stake in this case. However, the qui tam provisions do not in any way constitute a violation of the principle.

Article II of the Constitution vests all Executive power in the President and requires the Executive to faithfully execute the laws. U.S. CONST. art. II, §§ 1, 3. The Constitution does not mandate the unrealistic expectation that the three departments of government remain entirely free from and separate from each other. The branches work best when they are separate, yet interdependent, autonomous, yet reciprocal. *See Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J.).

The Supreme Court has established that when an act of Congress is accused of threatening the integrity of another branch's authority and independence, the proper separation of powers inquiry is whether Congress has "impermissibly undermined" the role of that branch. *Commodity Futures Tracking Com'n v. Schor*, 478 U.S. 833, 856 (1986). Therefore, the question here is whether the qui tam provisions disrupt the balance between the branches by preventing the Executive

Branch from performing its constitutionally assigned duties.

b) The Qui Tam Provisions & the Separation of Powers Principle

In answering that question, the Court finds that the qui tam provisions of the Act are in tune with the constitutional principle of separation of powers. The provisions have been carefully drafted with the intention to maintain the Executive Branch's clear ability to prosecute false-claims actions even when initiated by a private citizen. The Executive Branch maintains "sufficient control" over the relator's handling of the case to "ensure that the President is able to perform his constitutionally assigned duties." *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994) (quoting *Morrison*, 487 U.S. at 696). In the case of *Morrison*, the Supreme Court was faced with a separation of powers challenge to the independent counsel provisions of the Ethics in Government Act of 1978. The Ethics in Government Act creates a special division of the federal court of appeals for the District of Columbia which is empowered to appoint an independent counsel and to define his prosecutorial jurisdiction. The Supreme Court found that the Ethics in Government Act did not undermine the Executive Branch's ability to perform its constitutionally assigned functions since the Attorney General retains control over the independent counsel.

In the original version of the False Claims Act, the government was not afforded the right to intervene and take over the lawsuit after the relator had commenced the suit. The 1986 versions of the Act, however, gave

the Executive Branch greater control over the qui tam lawsuit. Likewise, the 1986 version of the qui tam provisions of the Act provides that the Executive Branch maintains control over the litigation, if it so chooses.

The First Congress incorporated the concept the qui tam action into American law, and historians would likely infer that that fact "provides contemporaneous and weighty evidence" that the qui tam concept is consistent with the constitutional principle of separation of powers. *Stillwell*, 714 F. Supp. at 1086 (quoting *Bowsher v. Synar*, 478 U.S. 714, 723 (1986)).[14] The Act

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[14] The Supreme Court has stated that:

> Qui tam suits have been frequently permitted by legislative action, and have not been without defense by the courts. . . . Congress has the power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the . . . statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours. Sound rules of statutory interpretation exist to discover and not to direct Congressional will.

Marcus, 317 U.S. at 541-42. Since the Supreme Court's holding in *Marcus*, the amendments to the Act have made the Act even more favorable.

The Supreme Court in the *Marcus* case made an interesting comment on the constitutionality of the Act:

> It is said that effective law enforcement requires that control of litigation be left to the Attorney General; that divided control is against the public interest; that the Attorney General might believe that was interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity to profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863.

cannot be declared unconstitutional based upon the allegation that it violates the doctrine of separation of powers. In no way does the Act deprive the Executive Branch's ability to enforce the law by allowing the relator (or judicial branch) to have full control of the lawsuit. While the Executive Branch does not maintain absolute control over the relator's suit, the Act clearly allows the government, at any time, to move to intervene in the lawsuit's proceedings. Throughout, the entire lawsuit, the government may elect to be served with all of the pleadings and deposition transcripts so that it may monitor the relator's handling of the suit. 31 U.S.C. § 3703(c)(3). Furthermore, if the government chooses to intervene, it retains the ability to settle or even move to dismiss the action – even if the relator objects.[15] If, on the other hand, the relator and defendant negotiate a settlement, the government may

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But the trouble with these arguments is that they are addressed in the wrong forum.

Marcus, 317 U.S. at 547.

[15] A court may dismiss an action, at the government's request, but the relator is permitted to voice its objections to such request before the court takes action. 31 U.S.C. § 3703(c)(2)(A)-(B).

Searcy v. Philips Electronics North America found that the government has the absolute power to veto voluntary settlements in qui tam suits under the Act. Judge Higginbotham found that although the statute gives the relator the "right to conduct the action" he also found that the statute may be dismissed only if the court and the Attorney general give written consent to the dismissal and their reasons for dismissal. 117 F.3d 154 (5th Cir. 1977). This Fifth Circuit finding has created a split in the circuits.

The Ninth Circuit in *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994), *cert denied*, 117 S.Ct. 296 (1996) found that the government's consent is only required during the initial 60-day period in which the government determines whether to intervene.

elect to intervene if it finds that the terms of the settlement are unacceptable, provided good cause is shown for such intervention. *Id.* at § 3730(c)(3).[16] The government also retains the ability to stay discovery upon a showing that the relator's efforts in the civil action would interfere with another governmental investigation. *Id.* at § 3730(c)(4). The government may also request that the court impose limitations on the relator's participation if it shows that unrestricted participation "would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment." *Id.* at § 3730(c)(2)(C).[17]

It appears to this Court that the Act quite clearly permits a private citizen to sue on behalf of the government while just as clearly allows the government to not only monitor the suit but ultimately control or determine its outcome, upon leave of the court. The traditional Article III separation of powers policy con-

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[16] *Morrison* also found that the provision in the Ethics in Government Act requiring the Attorney General to show "good cause" to remove an independent counsel and that the removal decision is subject to judicial review does not offend constitutional principles by possibly permitting excessive judicial involvement. *See Morrison v. Olson*, 487 U.S. 654, 691. Likewise, this Court finds that requiring the government to show good cause in certain motions in a qui tam suit does not permit excessive judicial involvement.

[17] Unlike the Ethics in Government Act, the False Claims Act does not give the government as much control over the initiation and prosecution of the case in that the Attorney General cannot in a qui tam case appoint an individual or his or her choice, determine counsel's jurisdiction, or remove the counsel at will. Nonetheless, the government still exercises a significant amount of control over the qui tam relator as it can over the independent counsel.

cerns are not pushed aside in any manner by allowing qui tam suits under the Act. These suits do not intrude into areas committed to other branches of government.

In sum, the Act grants the executive branch significantly greater control than that provided for in the Ethics in Government Act of 1978 and which the Supreme Court validated in *Morrison*.[18] Therefore, in accordance, the challenge based upon the separation of powers concern will not prevail.

B. THE FAILURE TO PLEAD FRAUD WITH PARTICULARITY

Defendant National moves for dismissal of the lawsuit under Fed. R. Civ. P. 9(b) because the Relator has failed to plead its case of fraud with particularity.[19]

Rule 9(b) imposes a heightened pleading requirement for allegations of fraud. The Rule provides that averments of fraud shall be stated "with particularity." Fed. R. Civ. P. 9(b). The Fifth Circuit has required that "Rule 9(b) requires allegations of the particulars of time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Sushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5th Cir. 1993). The purpose of the rule is to place the defendant on notice of the precise misconduct of which it is charged. A

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[18] For a detailed overview of the provisions of the Ethics in Government Act, see *Kelly*, 9 F.3d 743.

[19] Rule 9 of the Federal Rules of Civil Procedure provides as follows:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

FED. R. CIV. P. 9(b).

determination of what constitutes adequate "particularity" depends upon the facts of each case. This particularity requirement may be relaxed if a defendant controls the information required for proper pleading. *See, e.g., United States ex rel. Sanders v. East Alabama Healthcare Authority*, 953 F. Supp. 1404 (M.D. Ala. 1996); *United States ex rel Robinson v. Northrop Corp.*, 824 F. Supp. 830 (N.D. Ill. 1993) (finding that plaintiffs must describe the outline of the fraudulent scheme and facts identifying the who, what, when, and where of the fraud). However, the complaint should still adduce specific facts supporting a strong inference of fraud to satisfy the relaxed standard.

This Court finds that the standard for pleading fraud under the Act is not a strict application of the Rule 9(b). The Rule requires that "the circumstances constituting fraud . . . shall be stated with particularity," and is to be read in conjunction with Rule 8. *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 959 (D.C. Cir. 1985). *See also* 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1298 (1990 & Supp. 1998) ("Perhaps the most basic consideration in making a judgment as to the sufficiency of a pleading is the determination of how much detail is necessary to give adequate notice to the adverse party . . . it is inappropriate to focus exclusively on the fact that Rule 9(b) requires particularity in pleading fraud.")[20] The pleadings, however,

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[20] Rule 8 provides in relevant part:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends,

cannot be based on speculation and belief unless the factual information is "peculiarly within the defendant's knowledge and control." *United States ex rel. Wilkins v. Ohio*, 855 F. Supp. 1055, 1061 (S.D. Ohio 1995). *See also United States ex rel. Long v. SCS Business & Tech. Inst.*, 1998 WL 151290 (D.D.C. Mar. 26, 1998); *Steiner v. Southmark Corp.*, 734 F. Supp. 269, 273 (N.D. Tex. 1990) (finding that Rule 9(b) may be relaxed when matters are within the opposing party's knowledge). In such a case, pleading on formation and belief is acceptable. *Stinson*, 755 F. Supp. at 1056-57. A strict enforcement of Rule 9 would simply frustrate the purpose of the Act.

In this case, Defendant National contends that the Complaint is woefully deficient in providing the details regarding the alleged fraud. Specifically, Defendant National alleges that "Churchill has not alleged any specific instance in which [National] failed to pursue, on a cost-effective basis, recovery from third parties. . . . Churchill has not alleged any document prepared by [National], and submitted to the United States Government in connection with a claim for fees. . . . Churchill must identify actual Medicaid claims. . ." *Def. National's Mot. To Dismiss*, at 6-7.

The Court finds that the Relator has satisfied the rule's requirement in that he places the Defendant National on notice of the precise misconduct which spanned over a course of several years of which it is

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. . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for the judgment for the relief the pleader seeks.

FED. R. CIV. P. 8.

charged.[21] In his Complaint, he identifies the fraudulent acts and the violations of government law, and he identifies the defrauding parties and their roles in the fraud. It appears to the Court that the qui tam plaintiff in the initial complaint would be unable to provide such detail as to the exact claim made, the date of the claim, etc., especially as in this case, where the Relator has left employment with Defendant, and the Court doubts that the Relator was able to take the required documents with him. The Relator, however, must give a reasonable delineation of the specifics of the false claims so that exact proof may be obtained through the discovery process. The Realtor in this case has not placed Defendant National on a fishing trip based on a belief that fraud may have occurred. Instead, the Relator has given Defendant National more than adequate notice of the alleged fraud at this stage of the game in order to support a claim for fraud.

The Court shall deny Defendant National's Motion to Dismiss for failure to plead fraud with particularity.

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[21] Although the Court refrains from presenting a paragraph by paragraph analysis, the following are examples of the Complaint's contents: Paragraphs 24 - 28 & 31 of Relator's Complaint state the general scheme of fraudulent conduct among Defendants; paragraph 29 establishes the specific contract Defendant National entered into with Defendant Texas Department of Health and Services; paragraph 30 presents allegations that Defendant National received premiums for which it was not entitled; paragraphs 33-36, 39-48 describe the facts surrounding how Relator discovered that collections received from subrogation in tort cases was substantially low as compared to the potential.

C. FAILURE TO STATE A CLAIM UNDER THE FALSE CLAIMS ACT

Defendant National asserts that the Relator's Complaint alleges "reverse false claims" and that such claims arise when an entity is accused of submitting under-payments to the government as opposed to submitting false claims for payment from the government. *See* 31 U.S.C. § 3729(a)(7). The Relator in his Response asserts that his Complaint alleges violations of 31 U.S.C. § 3729(a)(1),(2),(3) *and* (7). *Relator's Resp to Def. National's Mot. To Dismiss.* at 4. The Relator states that the fact that the claims were made to the State of Texas rather than directly to the United States government is irrelevant since such claims still fall under the territory of the Act's definition of a claim. *Id.*

The Relator states that the Defendant National is wrong in asserting that the Complaint is based upon "reverse false claims."[22] The Court assumes that the Relator is more familiar with his own Complaint than is Defendant National. Likewise, the Court shall accept all pleaded facts as true and shall construe the Complaint in the Relator's favor. *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). There is no doubt that the Act is intended to remedy all fraudulent attempts to cause the government to pay out money. S. Rep. No. 345, at 9; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 544-45 (1943). The Act has also been held to reach conduct which results to losses to the government, even though the defendant

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[22] Reverse false claims in which a defendant allegedly reduced the payment owed to the government through some fraudulent means as opposed to submitting a fraudulent claim for payment to the government. 31 U.S.C. § 3729(a)(7).

did not actually make a demand for the money. *See Long*, 1998 WL 151290, *12 (citing *United States v. McLeod*, 721 F.2d 282, 284 (9th Cir. 1983)). The Act has also been held to include conduct where a defendant caused others to present false claims to the government. *Id.* 811 (citing *United States v. Teeven*, 862 F. Supp. 1200, 1223 (D. Del. 1992)). Once again, the Act reaches all parties who engage in fraudulent conduct against the United States.

The Court, therefore, follows the Relator's argument that an entity is still liable under the Act even if it submits false claims to a recipient of federal funds and the claims are then paid from federal funds. *See United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144, 1146-47 (S.D. Cal. 1976).[23] The Relator has alleged, with requisite specificity at this time, that Defendant National allowed false claims to be presented to the federal government over a number of years.

In essence, the Court shall deny Defendant National's Motion to Dismiss for failure to state a claim.

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[23] Furthermore, the Court is reminded of the definition of a "claim" as being "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient of the United States Government provides any portion of the money or property which is requested of demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

D. SOVEREIGN IMMUNITY

The State Defendants assert that the State and its agencies cannot be sued in federal court without their consent or without a clear abrogation of their immunity by Congress. The State Defendants concede that a state's sovereign immunity is not an issue in a suit by the federal government against the state. However, they assert that this particular case raises the question whether Congress can extend the federal government's authority to bring suit against a state to authorize private party litigation without violating the Eleventh Amendment. In relying upon *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 784 (1991), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), State Defendants infer that Congress has no power to abrogate a state's sovereign immunity by permitting a private party to commence and prosecute a suit against the State. They also assert that the Eleventh Amendment can only be by-passed in a suit in which the United States is the party who commences and prosecutes the action. *See Blatchford* 501 U.S. at 784.

In this Court as in most of the federal courts, the scope and application of Eleventh Amendment continues to be a source of debate.

The Constitution of the United States provides the following:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend XI.

The plain language of the Eleventh Amendment prohibits suits in federal court by citizens of one State against another State or by aliens against any State. In addition, the Supreme Court has construed the Amendment to prohibit suits against States by their own citizens. *See Hans v. Louisiana*, 134 U.S. 1 (1980); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982). Furthermore, the Supreme Court has also construed the Amendment to prohibit suits against States by foreign States or sovereigns. *See Monaco v. Mississippi*, 292 U.S. 313, 330 (1934); *Blatchford*, 501 U.S. 775, 778 (1991) (recognizing the sovereignty of Indian Tribes).

The Eleventh Amendment bar to suits against States is bypassed, however, under the following circumstances:

(1) when the State has waived immunity and consented to the suit. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883), *Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Papasan v. Allain*, 478 U.S. 265, 276 n.10 (1986); or

(2) when Congress has clearly expressed its intent to abrogate or limit that immunity through legislative authority. *See Quern v. Jordan*, 440 U.S. 332, 333-334 (1979); or

(3) when the suit is instituted under a fiction which allows suits for prospective injunctive relief against a State official in vindication of a federal right. *See Ex parte Young*, 209 U.S. 123 (1908).

A State's waiver of its Eleventh Amendment immunity may be found "only where stated 'by the most express language or by such overwhelming implications from the text as [would] leave no room for any other reasonable construction.'" *Edelman*, 415 U.S. at 673 (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)); *see also Ex parte State of New York*, 256 U.S. 490 (1921).

Congressional resolution to abrogate or limit a State's Eleventh Amendment immunity must be clear by "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (quoting *Quern*, 440 U.S. at 342).

As State Defendants agree, a state's sovereign immunity is not an issue in a suit by the federal government against the state. *See West Virginia v. United States*, 479 U.S. 305 (1987); *United States v. Mississippi*, 380 U.S. 128 (1965). However, where the government is not a party, as in this case, State Defendants argue that they are protected against suit by sovereign immunity.

Thus, the Court and State Defendants would likely agree that if the Relator's action against State Defendants is considered a suit by the United States, then such suit would not be barred by the Eleventh Amendment.

The Fourth Circuit, in *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961

F.2d 46 (4th Cir. 1992) held that even when the government elects not to intervene, it remains the real party in interest, and therefore, the sovereign immunity defense is unavailable. "[T]he structure of the qui tam procedure, the extensive benefit flowing to the government from any recovery, and the extensive power the government has to control the litigation weigh heavily against the [defendant's] position." *Id.* at 49. The Fifth Circuit in *Searcy* followed the Fourth Circuit's holding that the government is the real party in interest. *Searcy*, 117 F.3d at 156 (finding that the government is the real party in interest and therefore, *Seminole Tribe* has no bearing). *See also United States ex rel. Foulds v. Texas Tech Univ.*, 980 F. Supp. 864 (N.D. Tex. 1997) (finding state sovereignty as non-issue as qui tam suit is one by government against state).

The Second Circuit, in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2nd Cir.), *cert. denied*, 508 U.S. 973 (1993), found that the government remains the real party in interest. The Court in *Kreindler* did not address whether sovereign immunity was a valid defense because it found that since the relator was not the original source of the fraud, it lacked standing.

The Ninth Circuit in *United States ex rel. Fine v. Chevron, U.S.A., Inc.* concluded that "in a qui tam action, the government is the real party in interest." 39 F.3d 957, 963 (1994) (quoting *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994)).

The District of Columbia, in *United States ex rel. Long v. SCS Business & Technical Institute* clearly

found that "[the] Eleventh Amendment is not a bar to an FCA [False Claims Act] action because the United States is always the plaintiff in a *qui tam* action and the Eleventh Amendment does not prohibit suits by the United States against States in federal court." 1998 WL 151290, *3 (citing *Seminole Tribe*, 517 U.S. at 71 n.14 (citing *United States v. Texas*, 143 U.S. 621, 644-45 (1892)(noting that state compliance with federal law is ensured by the fact that the federal government can sue a state in federal court for a violation of federal law))).[24]

The Supreme Court in *Seminole Tribe* determined that the Eleventh Amendment prohibited Congress from allowing suits by Indian tribes against the States for prospective relief. While the Court determined that Congress' intent to abrogate the states' immunity from suit was unmistakably clear, it also determined that the Indian Gaming Regulatory Act was not passed pursuant to a valid exercise of power. *Seminole Tribe*, 116 S. Ct. at 1124. Following *Seminole Tribe's* thinking, State Defendants in the case at hand also state that

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[24] The District Court of Columbia stated that states are often defendants in qui tam suits under the Act: *United States ex rel. Berge v. Board of Trustees of the Univ. of Alabama*, 104 F.3d 1453 (4th Cir.), *cert. denied*, 118 S.Ct. 301 (1997); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr*, 961 F.2d 46 (4th Cir. 1992); *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370 (5th Cir. 1980); *United States ex rel. Wilkins v. Ohio*, 885 F. Supp. 1055 (S.D. Ohio 1995); *United States ex rel. Milam v. Regents of Univ. of California*, 912 F. Supp. 868 (D. Md. 1995); *United States ex rel. Moore v. University of Mich.*, 860 F. Supp. 400 (E.D. Mich. 1994); *United States ex rel. Fine v. University of California*, 821 F. Supp. 1356 (N.D. Cal. 1993), *aff'd*, 72 F.3d 740 (9th Cir. 1995); *United States ex rel. Navarette v. Rockwell Int'l Corp.*, 730 F. Supp. 1031, 1035 (D. Colo. 1990).

Congress was simply without power to delegate authority to the qui tam plaintiff. In addition, they assert that the Act also does not clearly abrogate the states' immunity.

This Court, however, finds that the Supreme Court's ruling in *Seminole Tribe* was not a pseudo overruling of previous Circuits' rulings as to sovereign immunity and the qui tam action. That case stated that Congress must use unequivocal statutory language if it intends to abrogate a state's sovereign immunity in suits brought by and for private parties. However, this in a non-issue in a case brought by a private party but for the federal government. That *Seminole Tribe* case left in tact the fact that the federal government may sue states in federal court. *Seminole Tribe*, 116 S.Ct. at 1131 n.14.[25] As explained above, the government is the real party in interest, regardless of whether is has elected, as in this case, not to intervene at this time. The government has chosen not to intervene at this time in this particular lawsuit. The government may never intervene in Relator Churchill's suit; however, the fact that the government *can* intervene at any time is an important point to remember. Therefore, this Court finds that sovereign immunity is unavailable and the Supreme

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[25] In *Chavez v. Arte Publico Press*, the Supreme Court remanded the case for reconsideration in light of its *Seminole Tribe* ruling. On remand, the Fifth Circuit found that *Seminole Tribe* inescapably suggests and declares that "Congress cannot condition states' activities that are regulable by federal law upon their 'implied consent' to being sued in federal court." 1998 WL 184437, *3 (5th Cir. 1998). That case dealt with provisions of the Copyright and Lanham Acts and a theory of implied waiver, and a suit by a private citizen brought on her own, and not on the government's behalf.

Court's analysis in *Seminole Tribe* is inapplicable. State Defendants' Motion to Dismiss based on sovereign immunity shall be denied.

E. THE MEANING OF "PERSONS" WITHIN THE FALSE CLAIMS ACT

State Defendants argue in the alternative that the State and its agencies are not "persons" within the meaning of the Act, and therefore, they cannot be held liable for any alleged fraudulent conduct.

The Act provides in part that "any person" who causes false claims and reports to be presented to the United States for payment, or who forms a conspiracy to have false claims paid by the United States, will be liable for treble damages and civil penalties. *See* 31 U.S.C. § 3729. The Act, in this particular section, does not define the word person. *See id.* at § 3729. Section 3733, however, defines "person" to include the state. *Id.* at § 3733(1)(4).[26]

As State Defendants would infer, therefore, under the "clear statement rule," a state and its agencies cannot be sued under the Act. However, the Court will not deny State Defendants sovereign immunity on the one hand and then find them not be "persons" within the meaning of the Act on the other hand. As one

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[26] State Defendants assert that this Section 3733's inclusion of the state as "persons" applies only to instances involving civil investigative demands as they pertain to the Attorney General's authority to issue them upon persons who have possession and control over documents relevant to the investigation. Generally, this section requires the states to provide such information to the federal government upon request.

Court stated, the "fundamental task in interpreting the FCA is 'to give effect to the intent of Congress.'" *Long*, 1998 WL 151290, *4. The common usage of the term "person" usually does not include the sovereign. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) (finding that "person" in 42 U.S.C. § 1983 does not include the state).[27] However, although the term "person" ordinarily does not include the sovereign, this ordinary usage "may . . . be disregarded if '[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute . . . indicate an intent, by the use of the term, to bring a state or nation within the scope of the law.'" *See International Primate Protection League v. Administrators of Tulane Educ. Fund.*, 500 U.S. 72, 83 (1991). The purpose of the Act is to act as a weapon against *all* fraud *on the United States government.* Therefore, the Act was intended to benefit the *United States government.* The Act is not simply a suit by a private citizen for a private citizen; it is a suit by a private citizen, *for* the United States government, *on behalf of* the United States government. Congress did not need to clearly state its intention to abrogate state immunity since any suit brought pursuant to this Act is brought on behalf of the federal government, and states have no immunity

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[27] This case involved a 42 U.S.C. § 1983 action which established a cause of action for individual plaintiffs. The False Claims Act, on the other hand, establishes civil penalties for fraud at the expense of the United States.

See also Hilton v. South Carolina Public Railways Commission, 502 U.S. 197, 205 (1991)(finding that the Supreme Court ruling in the *Will* case did not create a per se rule of constitutional law that precluded the application of general liability statutes to the states, absent a clear statement by Congress that it intends to subject the states to the provisions of the law).

in suits by the federal government.[28] The Court does not believe that Congress would be naive enough to think that state governments and their agencies would not perpetrate fraud upon the federal government. The federal government has contracts with all types of "persons" including corporations, private businesses, and states, and state agencies. Consequently, if a state and its agencies are indeed the central violator of fraud upon the government, Congress would simply not intend to allow that particular state the use of the immunity defense.

Furthermore, courts have permitted states to serve as relators and to bring qui tam actions on behalf of the government. *See* 31 U.S.C. § 3730(b); *United States ex rel. Woodard v. Country View Care Center, Inc.*, 797 F.2d 888 (10th Cir. 1986) (Colorado as relator); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (Wisconsin as relator). Thus, it seems only logical that if states are permitted to serve as relators, then they are considered "persons" within the Act. The sword is a double-edged one.

State Defendants also note that they should not be considered "persons" under the Act, which imposes treble damages on violators, because courts have been reluctant to impose states to punitive damages.

The Act's purposes is to recover losses the government has sustained as a result of fraud. *See* S. Rep. No.

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[28] Compare to *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, No. 3-95-168 (D. Minn., filed July 23, 1997) (finding that based on history, Congress most likely did not intend for "persons" to include states).

345. The Supreme Court found in several cases that the Act was a remedial and not a punitive statute. All of these cases, however, did refer to the pre-1986 Act which provided for double and not treble damages. *United States v. Bornstein*, 423 U.S. 303, 314-25 (1976) (finding damage provisions as remedial except under extreme circumstances); *Marcus*, 317 U.S. at 551-52 (finding that the Act's purpose was to make the government whole and therefore the damage provisions were not punitive). Other courts have referred to the Act's damages provisions as "rough remedial justice." *See e.g., United States v. Brekke*, 97 F.3d 1043, 1047 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1281 (1997). *See also Sanders*, 953 F. Supp. 1404 (finding that absent proof of actual damages to the United States, relators will not be allowed treble damages). This Court concludes that provided there is a rational relation between the government's losses and the damages assessed, then the Act's damage provisions are not punitive in nature.

The Court tries to avoid contradicting itself too much. Therefore, until it is very established that state defendants, such as those in this lawsuit, can claim sovereign immunity under the Act, the Court refuses to find that State Defendants are not persons under the Act. This Court concludes that for purposes of Section 3729 of the Act, the term "persons" includes states and all their agencies. State Defendants' Motion to Dismiss based on this argument shall be denied.

IV. CONCLUSION

As this Court demonstrated in the past, it is certainly not afraid the declare an Act of Congress as wholly unconstitutional.[29] However, after an extensive review of Defendants' Motions to Dismiss and the law surrounding the False Claims Act, this Court concludes that the Act's qui tam provisions do not conflict with Article III of the Constitution, nor do they violation the separation of powers principle. Furthermore, the Court finds that State Defendant are "persons" within the meaning of the Act, and they also do not enjoy immunity from suit. Finally, the Relator's Complaint is pled with sufficient specificity to put the Defendants on notice so that they can prepare their defense, as the Court is certain that they have already done so.

Accordingly,

IT IS ORDERED that Defendant National Heritage Insurance Company's Motion to Dismiss Plaintiff's First Amended Original Complaint is hereby **DENIED.**

IT IS FURTHER ORDERED that State Defendants' Motion to Dismiss is hereby **DENIED.**

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[29] *See Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex. 1995) (finding the Religious Freedom Restoration Act as a violation of the U.S. Constitution by changing the burden of proof as established under the *Employment Division v. Smith*, 110 S. Ct. 1593, free exercise cases). The Supreme Court, after reversing the Circuit Court, agreed that the Religious Freedom Restoration Act was unconstitutional. *See City of Boerne v. Flores*, 117 S.Ct. 2157 (1998).

SIGNED this 2 day of June, 1998.

/s/ LUCIUS D. BUNTON
LUCIUS D. BUNTON
HONORABLE LUCIUS D. BUNTON III
SENIOR U.S. DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50605

UNITED STATES OF AMERICA, EX REL.,
JAMES M. CHURCHILL, PLAINTIFF-APPELLEE

vs.

STATE OF TEXAS, ET AL., DEFENDANTS

STATE OF TEXAS; TEXAS DEPARTMENT OF
HUMAN SERVICES; TEXAS DEPARTMENT OF
HEALTH; TEXAS HEALTH & HUMAN SERVICES
COMMISSION, DEFENDANTS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, PECOS

[Filed: Oct. 21, 1998]

ORDER

IT IS ORDERED that the motion of the United States of America to intervene on behalf of appellee is GRANTED.

/s/ PATRICK E. HIGGINBOTHAM
PATRICK E. HIGGINBOTHAM
United States Circuit Judge

Supreme Court, U.S.
FILED
DEC 2 1999
CLERK

No. 99-774

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

THE STATE OF TEXAS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. 99-774

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

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THE STATE OF TEXAS, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

At issue in this case is whether the Eleventh Amendment's general prohibition against actions "commenced or prosecuted" by citizens against an unconsenting state bars an action brought by a private *qui tam* plaintiff against a state under the federal False Claims Act. U.S. CONST. amend. XI; 31 U.S.C. §§3729–3732.

The False Claims Act permits private citizens who believe a "person" has submitted a false claim for payment to the United States to sue the perpetrator to impose a penalty for the false claim, including treble damages. §§3729–3730. As an incentive, the private plaintiff receives a portion of the award.

§3730(d). While the statute deters fraud by private contractors, the Eleventh Amendment prohibits applying the False Claims Act to unconsenting states. The False Claims Act contains no language waiving the Eleventh Amendment immunity of states and, in any event, Congress has no power to abrogate the states' Eleventh Amendment immunity under its Article I constitutional powers. *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996).

SUMMARY OF THE ARGUMENT

The Eleventh Amendment prohibits suits "commenced or prosecuted" against the states by private citizens. U.S. CONST. amend XI. Suits against states brought by private relators under the *qui tam* provisions of the False Claims Act violate the states' immunity as sovereigns and offend their dignitary interest in avoiding the coercive process of federal judicial tribunals in suits brought by private citizens. Congress cannot circumvent the Eleventh Amendment's proscriptions by allowing private plaintiffs to "stand in the shoes" of the federal government. *Qui tam* suits are "commenced" and "prosecuted" by private citizens, and the potential intervention of the United States cannot change that fact.

Because the Court has already granted the petition for writ of certiorari in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828, to resolve the issue presented by petitioner, the Court should hold this petition pending resolution of *Stevens* and then dispose of the petition as appropriate.[1]

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1. Respondents have also filed a conditional cross-petition that raises the "persons" issue also presented in the *Stevens* case.

ARGUMENT

I. ALLOWING PRIVATE CITIZENS TO BRING *QUI TAM* SUITS AGAINST THE STATES VIOLATES THE ELEVENTH AMENDMENT.

Subjecting the states to suits for money damages brought by private citizens under the *qui tam* provisions of the False Claims Act violates the Eleventh Amendment and the principles that motivated its passage. *See* 31 U.S.C. §§3729–3732; U.S. CONST. amend. XI. The Eleventh Amendment was enacted in a firestorm of protest shortly after the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that Article III authorized a South Carolina citizen to bring a private suit for damages against the State of Georgia. One of the Amendment's primary aims was to address the states' concern that "federal courts would force them to pay their revolutionary war debts, leading to their financial ruin." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821).

In addition to the concern with protecting the states' fisc, Eleventh Amendment jurisprudence also emphasizes the need to protect the integrity of the states as sovereign entities. *Hess*, 513 U.S. at 39. "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citing *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). The purpose of the Eleventh Amendment was to prevent the indignity of subjecting states to suits by private parties in federal court. *Id.* (citing *In re Ayers*, 123 U.S. 443, 505 (1887)).

By seeking money damages from the states at the urging of private plaintiffs, *qui tam* suits accomplish exactly what the Eleventh Amendment forbids. The Court has recognized "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *Qui tam* suits brought by private citizens against the states are indistinguishable from other suits that impermissibly seek the payment of damages from a state's treasury. That the relator brings suit "on behalf of" the United States is irrelevant for Eleventh Amendment purposes. *See United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 883-84 (CADC 1999), *petition for cert. filed*, 68 U.S.L.W. 3116 (U.S. Aug. 2, 1999) (No. 99-213). The *qui tam* relator's supposed representation of the United States' interests is a legal fiction that cannot justify granting a private plaintiff the United States' exemption from the Eleventh Amendment's protections. *See In re Fernandez*, 130 F.3d 1138, 1138 (CA5 1997) (holding that private successors to the FDIC may not "avoid the Eleventh Amendment by slipping into the shoes of the United States"); *see also West Virginia v. United States*, 479 U.S. 305, 311 (1987) (sovereign immunity is not at issue in suit by federal government against state); *United States v. Texas*, 143 U.S. 621, 646 (1892) (same). It is "as plain as the sun" that Petitioner was "commenc[ing] or prosecut[ing]" *qui tam* suits "against one of the United States" in violation of the clear dictates of the Eleventh Amendment. *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 289 (CA5 1999); *see also* U.S. CONST. amend. XI. The Eleventh Amendment's protections of state sovereignty cannot be circumvented so easily. *See Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996).

When an action "is in essence one for the recovery of money from the state, the state is the real, substantial party in

interest and is entitled to invoke its sovereign immunity from suit." *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945); *see also Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). Even if the United States ultimately intervenes in the suit, that does not change the Eleventh Amendment analysis.[2] A private citizen is still commencing suit against the state for money damages. The Eleventh Amendment cannot countenance a private citizen's claim on state funds, regardless of whether the United States has joined the suit as a party.

II. CONGRESS HAS NOT CLEARLY ABROGATED STATE SOVEREIGN IMMUNITY IN THE FALSE CLAIMS ACT.

Congress did not attempt in the False Claims Act to clearly abrogate state sovereign immunity. *See Seminole*, 517 U.S. at 55-56; *Foulds*, 171 F.3d at 294. But even if Congress had clearly attempted to abrogate state sovereign immunity in the False Claims Act, it could not have validly done so. The Court has only allowed abrogation of state sovereign immunity under the Fourteenth Amendment. *Seminole*, 517 U.S. at 59, 63 (overruling the Court's short-lived holding to the contrary in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality)). Congress enacted the False Claims Act under Article I of the Constitution, which the Court in *Seminole* held cannot be used to circumvent the Eleventh Amendment's limits on federal jurisdiction. *Id.* at 72-73; *see also United States ex rel. Stevens v. Vermont Agency of Nat. Resources*, 162 F.3d 195, 224 (CA2 1998) (Weinstein, J., dissenting), *petition granted*, (U.S. June 24, 1999) (No. 98-1828).

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2. Contrary to petitioner Churchill's assertion, *see* Pet. in No. 99-779, p.9, the United States has intervened in this suit only to defend the constitutionality of the False Claims Act as applied to the states.

The pertinent analysis when state sovereignty is involved does not end with determining whether Congress has attempted to find a way to bypass the Eleventh Amendment, *i.e.*, by allowing a private party to vindicate "real party" rights of the federal government. Rather, the real question, as explained by the Court in *Seminole*, is whether Congress has the constitutional authority to do what it has done. *See Seminole*, 517 U.S. at 59; *see also City of Boerne v. Flores*, 117 S.Ct. 2157, 2159 (1997) (holding that the Religious Freedom Restoration Act was not a proper exercise of Congress's Fourteenth Amendment enforcement powers). As the Fifth Circuit held and as the D.C. Circuit in *Long* observed, "[*q*]*ui tam* plaintiffs cannot qualify as surrogates of 'responsible federal officers' who have the right to represent the sovereign to sue the respective states." *Foulds*, 171 F.3d at 293; *see Long*, 173 F.3d at 883.

Just as Article I provided no basis for the expansion of Article III in *Seminole*, the federal government's right to sue states cannot be expanded in opposition to the Eleventh Amendment by the device of *qui tam* suits. It is offensive to the Eleventh Amendment to use the states' surrender of sovereignty to the federal government to allow private parties to bring states into court and prosecute actions against them.[3]

Nor can the *qui tam* relator hide behind the jurisdictional skirts of the federal government. Private citizens cannot assume the federal government's right to sue states, which "is a narrow and nontransferable exception to the broad and

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3. One commentator has suggested that *qui tam* actions are the hidden source of power to allow Congress to render the Supreme Court law on abrogation meaningless and should be used routinely to vindicate federal rights. *See* Jonathan R. Siegel, *The Hidden Source of Congress' Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995).

fundamental constitutional principle of state sovereign immunity embodied in the Eleventh Amendment." *Stevens*, 162 F.3d at 214 (Weinstein, J., dissenting) (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991)); *see also United States v. Texas*, 143 U.S. 621, 646 (1892) (recognizing the federal government's right to sue because states gave their consent in joining the union). This Court should require the United States to sue the states itself if, in the exercise of its supremacy, it determines that such a suit is required to preserve the "permanence of the Union." *Texas*, 143 U.S. at 644-45. The nature of dual sovereignty requires as much. "The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

If the *qui tam* device in the False Claims Act poses no constitutional problem, then Congress could set up any number of statutory devices to circumvent state sovereignty as long as there is a federal interest. Without Congress so stating, every Title IX, Title VI, and Section 504 case against a state would become a potential *qui tam* case, in which the plaintiff will demand, not actual damages, but a share of three times the federal funds received by the state for the past six years. Every public benefits class action involving federal funds could be a potential *qui tam* case.

The False Claims Act is unconstitutional—if applied to the states—because, through the *qui tam* device, it attempts to accomplish precisely what is forbidden by the Eleventh Amendment.

CONCLUSION

For these reasons, the Court should hold the petition for writ of certiorari pending resolution of the *Stevens* matter.

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